COMMISSIONER LECTURE SERIES

The Church of Jesus Christ of Latter-day Saints
Church Educational System

The Popular Myth of the Victimless Crime

Dallin H. Oaks

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FOREWORD

COMMISSIONER'S LECTURE SERIES
by Neal A. Maxwell

It is a privilege to present scholars from various academic fields in a lecture series which permits them to draw upon their knowledge and insights in the context of their religious commitments.

The series seeks to achieve several objectives. First, it will provide forums for presentations, the content of which will reflect aspects of the congruence of high-level secular scholarship and spiritual truths.

Second, it will create opportunities for young members of the Church, as well as others, to hear from these high-achieving but orthodox individuals who have made their mark in various fields of scholarship.

All of the participants have my deep gratitude for their "second-mile" willingness to participate in this series, which has involved them with multiple audiences. These participants represent a large body of scholars of similar quality and with similar commitment to the gospel of Jesus Christ. It is fortunate that we can have the words and writings of at least a few.

*For biographical information, see the following page.

of Rex Lee

Dallin H. Oaks took office as President of Brigham Young University August 1, 1971. He graduated from BYU with high honors in 1954, receiving his B.A. degree in accounting. In 1957 he graduated from the University of Chicago Law School with the Doctor of Law degree (J.D.), *cum laude*, and was named to the highest legal scholarship society, the Order of the Coif. In his senior year he was editor in chief of the *University of Chicago Law Review.*

After graduation he began his legal career by serving for one year as a law clerk to Chief Justice Earl Warren of the United States Supreme Court. He then practiced law for three years with a large law firm in Chicago, specializing in corporate litigation. In 1961 he became an associate professor of law at the University of Chicago. His principal teaching activities during the next ten years were in wills and trusts, federal taxation, and criminal procedure. He also served as associate dean for almost a year and as acting dean for several months during a changeover between deans. In 1970 he became executive director of the American Bar Foundation, a large professional research organization affiliated with the American Bar Association.

Dallin H. Oaks' other professional activities have included one summer prosecuting criminal cases as an assistant states attorney of Cook County and another summer as a visiting professor of law at the University of Michigan Law School. He has served as appointed counsel for the defense in the trial and appeal of various criminal cases. He has conducted major studies of state and federal court administration and the provision of legal services for the United States Department of Justice and the Judicial Conference of the United States. From January through June 1970 he served as legal counsel to the Bill of Rights Committee of the Illinois Constitutional Convention. He is a member of the bar in Illinois and Utah and has been admitted to practice in the United States Supreme Court and other federal courts. He is also a member of the Advisory Committee of the National Institute of Law Enforcement and Criminal Justice.

Dallin H. Oaks has published four books dealing with the subjects of church and state, trust law, legal profession, and criminal procedure. He is also the author of about thirty articles published in leading legal periodicals and magazines.

Active in The Church of Jesus Christ of Latter-day Saints, he has served in various capacities, including service as stake mission president of the Chicago Stake and 8½ years as second counselor and first counselor in the presidency of the Chicago South Stake. He is married to the former June Dixon of Spanish Fork, and they have five children.

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The Popular Myth of the Victimless Crime

My topic is decriminalization—the increasingly successful efforts to obtain the repeal of criminal laws on many forms of behavior that traditionally have been treated as crimes. Current proposals would decriminalize all forms of sexual behavior involving consenting adults, including adultery, fornication, prostitution, homosexuality, and other forms of deviate sexual behavior. The more extreme proposals would even decriminalize commercialized sex, such as procuring for prostitution. Most decriminalization proposals would repeal criminal penalties on the possession of marijuana, LSD, and comparable drugs. Some would repeal the laws against possession of heroin, and a few would even decriminalize the sale of hard drugs. Other crimes usually included in decriminalization proposals are pornography, abortion, gambling, public drunkenness, and vagrancy.[1]

We should not underestimate the importance of these proposals. The publicity and political power gathering behind various decriminalization proposals is impressive indeed. The long list of organizations currently involved includes the President's Crime Commission, the National Council on Crime and Delinquency, the American Assembly, and even the American Bar Association.

Criminal law revisions already adopted or under favorable consideration leave no doubt that we are witnessing revolutionary changes in the function and content of criminal law. The effects are likely to be as far-reaching as the eighteenth-century reform movement that made the punishment fit the crime (thus abolishing capital punishment for several hundred minor crimes) and the nineteenth-century reforms that made the punishment fit the offender (thus introducing probation and indeterminate sentences). The decriminalization movement could appreciably change the business of the courts and the functions of the police. It could also bring about significant changes in our standards of morality.

I will identify the principal arguments for and against decriminalization, emphasize an important but neglected consideration, discuss the relationship between law and morality, and, finally, offer my recommendations on several of the specific proposals for decriminalization. But first, I offer the vital disclaimer. In this lecture I speak only for myself; my evaluations and recommendations should not be taken as the position of Brigham Young University or its sponsoring Church.[2]

Some Arguments Which Favor Decriminalization

One of the principal arguments in favor of decriminalization is that the inevitable effect of criminal penalties on many of these acts is to increase other crimes. Proponents suggest three ways this increase occurs. First, when we pass a law criminalizing particular goods or services, we drive out legal competition and leave the business to criminals. This underground trade will encourage organized crime, which will charge high prices as compensation for the risk of illegal behavior and then use its high profits to promote other criminal activities, just as the bootlegger's profits from prohibition days provided the capital for later investments in gambling, prostitution, and the drug traffic. Second, the high prices that patrons such as drug addicts must pay to the criminal proprietors will force these patrons to commit other crimes like robbery or theft to support their addiction. Third, criminal penalties on certain conduct will drive its participants to associate with other criminals, thus strengthening a subversive criminal subculture.[3]

Such arguments have considerable force in support of proposals to decriminalize offenses of a commercial nature like the drug traffic, gambling, and prostitution. They have little persuasive force for proposals to decriminalize crimes like public drunkenness, vagrancy, and most sex crimes.

A second argument relies on the obvious overloading of our police resources and the overcrowding of our courts and prisons. The crimes proposed for decriminalization are said to be less important to the public than many of the so-called serious crimes that we already lack sufficient resources to enforce properly. Decriminalization would therefore permit improved enforcement of criminal laws of greatest concern to the public.[4]

As with the first argument, this point has considerable force as to some decriminalization proposals and little or none as to others. For example, the amount of law enforcement resources currently committed to the enforcement of laws pertaining to drug offenses and public drunkenness is considerable. In contrast, the resources involved in enforcing laws against adultery or other private sexual offenses are negligible. A New York judge recently observed that so far as he was aware there had never been a criminal prosecution for adultery in New York State, although, as he observed dryly, "the opportunity has surely been presented."[5]

This argument for reallocating law enforcement resources has some vital flaws even as to those crimes that currently involve significant resources. Would the resources really shift, and would the increased efforts be effective if they did? Moreover, can we be so sure, as this argument glibly assumes, that it is the will of the people or in the best interest of society to close out our enforcement efforts on one crime in favor of some increase in effort on another? For example, on what objective criteria or system of values do we conclude that we should abandon enforcement of drug laws or drunkenness in order to shift public resources and increase the enforcement of laws against robbery or theft?

In terms of its prominence in popular discussion, the third argument in favor of decriminalization seems to be the most persuasive. Unlike the first two arguments, which apply only to some of the proposed crimes, this third argument unites the whole group of crimes under one theory and one label. The label is "victimless crime." The theory is that, if a person's conduct will not injure anyone other than himself—in other words, if the crime is "victimless"—it shouldn't be a crime. The intellectual scripture for this position is John Stuart Mill's classic essay *On Liberty*, which argues that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[6] A modern characterization of Mill's argument is the following:

> [*M*]*an has an inalienable right to go to hell in his own fashion, provided he does not directly injure the person or property of another on the way.*[7]

Along with the label "victimless crime," this argument has an apparently irresistible drawing power. More and more persons seem to be catching hold of the argument and label and climbing aboard the decriminalization bandwagon.

My objection to the victimless crime argument is twofold. First, I will discuss my contention that Mill's principle is misapplied in many of the proposals for decriminalization because these acts do involve harms and victims. Second, I will contend that Mill's argument is unsound in any case because the criminal law has an important function in addition to the protection of an identifiable victim.

I will discuss my first contention under the somewhat overstated subtitle "There is no such thing as a victimless crime." Some so-called victimless crimes have readily identifiable personal victims other than the criminal himself. Take the drug traffic, for example. The press has recently carried accounts of newborn babies suffering drug withdrawal symptoms because of their mothers' addiction during pregnancy. Another press account described addict mothers nursing infants who became addicted and wailed endlessly if the mothers were long deprived of their drug.[8] Just a few months ago a University of Utah Medical Center scientist announced the discovery of "a significant amount of chromosome breakage in most users" of marijuana, even among those who only smoked the drug less than once a week. Users had three times the rate of chromosome breakage as nonusers, a fact that could later be related to birth defects and even to cancer in their future offspring. Other directly identifiable victims of so-called victimless crimes are the innocent children whose family life is destroyed by the sexual irregularities of a parent or whose parents are pauperized by gambling or twisted by alcohol or drugs.

In other instances it is not possible to identify persons who are the direct victims of a particular crime. In some so-called victimless crimes, all society is the victim. In a close-knit, predominantly urban society such as ours, and in a country that is presently committed to an extensive program of welfare assistance for disadvantaged persons of many types, our lives are so interwoven that one person cannot rationally

tend that what he does to or with himself is of no concern to anyone but himself. Each person steers his ship of life through a very narrow passage. The wreckage of one person in that passage becomes a serious navigational hazard for many others. Thus, in John Stuart Mill's time it may have been possible to make a rational argument that society had no interest in restraining an individual who chose to destroy himself, such as by alcohol or drugs. But whatever the merit of that argument in nineteenth-century England, which had a relatively limited system of employing tax revenues to care for the sick and disabled, it is without persuasive force today.

Whether we like it or not, we live in a welfare state, where one or another agency of government is the ultimate provider for the aged, sick, disabled, and unemployed. If men or women wreck their health or destroy their capacity to labor, they and their natural dependents are almost certain to become a burden to some tax-supported agency of the local or national government. Taxpayers—all society—are the victims. The cost of rehabilitating a narcotic addict runs from $1,300 to $3,000 per year.[10] If a hunter shoots a hole in a $200 road sign, he can be arrested and put in jail. Vandalism is not a victimless crime. But if he shoots himself in the arm with heroin and becomes addicted, it may cost the state as much as $3,000 to rehabilitate him or more thousands to hospitalize him and care for his family. Yet some persons argue that a narcotics offense involving a consenting adult is a victimless crime.

Some would argue that the appropriate response is to withdraw welfare assistance from those who have deliberately destroyed their capacity to labor. But even if it were practical to enforce that rule against the guilty parties, which I doubt, our society would not penalize their families. Whether on moral or on practical grounds, our current charitable impulses and our welfare programs should be taken as an established fact for purposes of this argument. The potential financial burden gives society a keen interest in personally destructive behavior that once may have appeared of concern to no one but the person himself. A society that is committed to support has a basis to control.

Although the evidence is admittedly less well focused, I contend that we can also identify some personal and societal victims of crimes like pornography and sex-related offenses.

Hard empirical evidence that pornography is damaging to society is scarce or nonexistent. But common sense is sufficient evidence for some. I believe it would be acknowledged as common experience that the pictures and literature of the gutter produce the thoughts of the gutter and that the thought is parent to the act. Those who would reject this reasoning should consider the premise they are rejecting. Society and our school systems foster ennobling literature and educational material on the assumption that this material will affect behavior for good. If wholesome literature has a wholesome effect, how can the proponents of pornography be so sure that what is ugly and vicious will not encourage ugly and vicious behavior?

The most readily measurable social cost of irregular sexual behavior is the tax burden imposed on our society by illegitimacy. The annual number of illegitimate births in the United States is more than 300,000, with over half being born to women under twenty years of age.[11] Without the emotional and financial support of a normal family relationship, most of these illegitimate children are handicapped in their emotional development and need to be supported by tax revenues.

Last summer the American Bar Association passed a resolution urging the states to "repeal all laws which classified as criminal conduct any form of non-commercial sexual conduct between consenting adults in private. . . ."[12] This would wipe out laws against adultery, fornication, homosexuality, and other irregular sexual behavior. Such laws are frequently used as prototype illustrations of "victimless crimes." In contrast, I contend that society is the victim of these crimes because they pose a threat to the integrity of the family structure, which is the basic supportive institution in our society.

There is no social institution in which society has greater interest than the family. The survival of our society depends upon our having a predominance of citizens whose social interactions are secured by the adhesive of common moral values. The family is the indispensable agency for educating or socializing children in the values of the society.[13] The basic attitudes, characteristics, and values that guide us throughout our entire lives are acquired in our family surroundings at a very early age. There is no substitute for the family. "[T]he organized community has not developed methods of discipline and training which are equal in efficiency to those of the adequate home."[14] Thus, a prestigious federal commission suggesting goals for criminal reduction and prevention recommended the "highest attention" to preventin

juvenile delinquency. The report observed that "society has long depended on the authority of the family as a major instrument of social control and thus of crime prevention."[15] There is also abundant evidence on the vital importance of the family as the most effective institution to provide the basic emotional nutriment and support necessary if infants are to become adequately functioning human beings.[16] Adequate performance of this function may be more important in today's impersonal mass society than ever before.[17]

Though I know of no empirical evidence on the proposition, I believe that decriminalization of conduct involving sexual relations outside the bonds of marriage would weaken the ideal and practice of family life in this country. Sexual behavior is more than procreative. It is a great force that solidifies the relationship of the father and mother in a family.[18] Or it may tear the relationship asunder. Any sexual behavior outside the bonds of marriage can be a threat to family life in our society because our moral standards forbid it and because our laws make it a basis for divorce. If such behavior does not weaken or destroy family organization and functioning, it at least carries an unacceptable risk of such results. Adultery and fornication, if they do not produce illegitimate and unwanted children, may at least disrupt the tranquility of homes that should be devoted to raising well-balanced, stable children. The importance that society must attach to the stability of the family structure and the effectiveness of its function gives society a sufficient interest in the sexual behavior of persons who may affect families.

When a family is weakened, the children are affected and all society is the victim. As Commissioner Neal A. Maxwell has cautioned, "The unloved individual can be as dangerous as untreated sewage, and the sewage of sin is so devastating downstream in life" that it deserves as much time in the priorities of our planning as the other environmental concerns that are so often urged upon us in these times. "The consequences of unchastity may be less visible than those of drugs, but can be just as destructive. Both may be rooted in loneliness, or thrill seeking, and both produce tragic human debris with which we must deal."[19] In this manner the consequences of sexual relations outside the bonds of marriage extend beyond the participants to the detriment of members of their families, born and unborn, and to the public at large.

One of the most striking illustrations of the inappropriateness of the label "victimless crimes" in many of these situations I have been discussing is the fact that even John Stuart Mill, the patron saint of the decriminalization movement, recognized a legitimate social interest in criminal penalties on individual conduct that imposed "a definite damage, or a definite risk of damage, either to an individual or to the public. . . ."[20] Thus, Mill's celebrated essay *On Liberty* concedes that a person could be punished for idleness where the person was receiving support from the public.[21] A person could be punished for drunkenness where past experience had shown that drunkenness made him dangerous to those around him.[22] Although Mill advocated doing away with criminal punishment of persons indulging in gambling and fornication, he conceded that it might be appropriate to have criminal penalties on those who kept gambling houses or procured for prostitution because of the general social interest in discouraging such conduct.[23]

Mill also argued that the general social interest in an educated citizenry justified the state in forcing everyone to be educated up to a minimum standard. He said that parents who brought children into existence without providing instruction and training for their minds were guilty of "a moral crime, both against the unfortunate offspring, and against society. . . ."[24] Mill even carried this theory to the extent of arguing that, "in a country either overpeopled, or threatened with being so," parents who produced more than a small number of children had committed a serious wrong against all laboring people whose wages would be reduced by the excessive competition produced by overpopulation, as well as against all other persons affected by the "wretchedness and depravity" of the offspring.[25] In this respect John Stuart Mill was obviously more willing than most of us to see social injury in individual conduct and even to affix criminal penalties to that conduct. It is therefore ironic that his essay *On Liberty* is often cited in support of decriminalization of crimes in which there is no identifiable personal victim but for which there is demonstrable "damage or a definite risk of damage . . . to the public."[26]

By now you may be concluding that the whole concept of "victimless crimes" is artificial and unhelpful. I agree. The late Professor Herbert Packer, one of the principal proponents of decriminalization, conceded that Mill's formula "solves very little" because "it is usually possible to make a more or less plausible argument that any given form of conduct

involves some damage or risk of damage to the interests of others.[27] By conceding that the absence of an identifiable victim should not preclude criminal liability, Packer rejected Mill's test of "harm to others" as a criterion for criminal liability, but he contended that the victimless characterization should still serve as a limitation on the imposition of criminal sanctions in two ways. First, Packer contended that the absence of an identifiable victim should force an inquiry into the advantages and disadvantages of trying to suppress particular conduct by the criminal law. I agree with the appropriateness of that inquiry and will undertake it myself before I conclude. However, I cannot agree with Packer's other point—that the "victimless crime" characterization should help us assure "that a given form of conduct is not being subjected to the criminal sanction purely or even primarily because it is thought to be immoral."[28] To the contrary, the entire process of identifying the victims of crime is heavily dependent upon our basic assumptions about morality.[29] For example, our opinion on whether abortion is a victimless crime is a function of whether we recognize any protectable interest in the embryo or fetus, and this decision is itself dictated by moral assumptions about the nature and origin of life.

Thus far I have described and evaluated various arguments in favor of decriminalization, assigning significance to some arguments but concluding with an attempt to discredit the rhetoric of the so-called victimless crime. I now proceed to my second main topic, an argument against decriminalization, in which I contend, contrary to John Stuart Mill and Herbert Packer, that the criminal law has an important function other than the protection of an identifiable victim. That function is to reinforce certain moral values or standards. Speaking in headlines, I assert that there are times when the law can and does and should legislate morality.

Some Arguments Against Decriminalization

I begin by highlighting the important standard-setting and teaching function of the criminal law. The point needs emphasis because it is often omitted by persons whose "victimless crimes" orientation causes them to focus exclusively on the question of measurable harm to identifiable victims. The criminal law also exists for the protection of society at large. The standard-setting function of law can also be overlooked by those who are preoccupied with whether a particular law can be effectively enforced. Enforcement is an important consideration but not a dispositive one. Because of its teaching and standard-setting role, the law may serve society's interest by authoritatively condemning what it cannot begin to control directly by criminal penalties. This standard-setting function of law is of ever-increasing importance to society in a time when the moral teachings and social controls of our nation's families, schools, and churches seem to be progressively less effective.

It is easy to give examples of the enormous educative influence of the law. Law focuses our attention on a particular problem, enacts a solution, and sometimes even provides and persuades us with reasons for the solution. By this means laws sometimes resolve and put a mark of official finality on bitterly contested social issues. This has been the case with entitlement to social security, the legality of labor unions and the right to strike, the progressive income tax, and the right to be free from racial discrimination in government, common carriers, and places of public accommodation.

This last example is recent and persuasive. You will recall the prolonged debate over the Civil Rights Act of 1964, especially the section forbidding racial discrimination in public accommodations. The issue was whether a proprietor on an interstate highway should be compelled to provide service to blacks or any other group with whom he preferred not to deal. The country was bitterly divided over that issue, and only Senator Everett Dirksen's last-minute change of mind (an important decision by an influential conservative Republican) obtained passage of the Civil Rights Act by a very narrow margin. Today, just ten years later, the controversy seems as if it had come from another century. With the passage of the Civil Rights Act we not only changed our law, but we also changed our minds. Today the proposition adopted in that legislation is well accepted from coast to coast and from north to south.

The *repeal* of laws can also have an educative effect. If certain activities are classified as crimes, this is understood as a public declaration that the conduct is immoral, bad, unwise, and unacceptable for society and the individual. Consequently, if an elected legislative body removes criminal penalties, many citizens will understand this repeal as an official judgment that the decriminalized behavior is not harmful to the individual or to society. Indeed, some may even understand decriminalization as a mark of public ap-

proval of the conduct in question. In these reactions lies a great danger for some decriminalization proposals.

The law is an effective teacher, and it can teach for good or for ill. Laws can affect the attitudes of our citizens about what is right and wrong, fair and unfair, proper or improper, advisable or inadvisable. The criminal law is a moral force, and that force is exerted without regard to whether or not there is an identifiable victim and, to a certain extent, without regard to whether or not the particular law is enforced. As Dr. Richard J. Neuhaus recently reminded us:

> *Through laws a community tries to reinforce what it considers right and good, and to restrain or suppress what it considers wrong and bad. . . . Law-making never has been and never can be value-free, objective, computerized. . . .*
>
> *The debate, then, about what ought and what ought not to be a crime is a debate about morality. Legal discourse—at least reflective legal discourse—is moral discourse.*[30]

Neuhaus' comment explains why it is shortsighted and simplistic to say that we cannot legislate morality. As Yale Law School Dean Eugene Rostow declared, "We legislate hardly anything else." [31]

Morality and Law

But whose morality or values is the law to teach? Here we meet an old controversy over the relationship between the criminal law and the principles of morality or right and wrong. A hundred years ago Sir James Fitzjames Stephen confronted John Stuart Mill on this issue.[32] In our own day the most prominent protagonists are Sir Patrick Devlin and Professor H. L. A. Hart.[33]

My support belongs to Lord Devlin, who argued that society has the right to "legislate against immorality" because without a "common morality," which he defined as the moral judgment of the "reasonable man," society would disintegrate.[34] Devlin's adversary, Professor Hart, who classified himself with "John Stuart Mill and other latter-day liberals," rejected this as "an unjustifiable extension of the scope of the criminal law."[35] By this view, the only "common morality" the law could enforce would be principles "essential to the existence" of a society of human beings, like rules against violence or other harm to an identifiable victim.[36]

In common with Lord Devlin, I contend for the desirability of legislating on a broader moral front. I would not, however, agree to Lord Devlin's assertion that "the law must base itself on Christian morals and to the limit of its ability enforce them."[37] In past centuries most criminal laws were almost direct codifications of religious principles. Historic abuses such as the Salem witch trials and official penalties for religious heresy have forced the direct religious source of law to yield to our constitutional separation between church and state. Today no thoughtful American would advocate using the criminal law to enforce that portion of the religious-moral law pertaining to religious belief or practice. But religious principles of right and wrong or good and evil in matters of individual behavior continue to wield an important moral influence on the content of the criminal law through their effect on the opinions and actions of individual citizens in the lawmaking process.

In his illuminating John Randolph Tucker Lecture at Washington and Lee University, President Edward H. Levi improves Lord Devlin's position and makes it acceptable to American secularism. Here is how he describes it:

> *In matters of morality, the law-maker's function, as Lord Devlin saw it, was to enforce those ideas about right and wrong which are already accepted by the society for which he was legislating and which were necessary to preserve its integrity. . . . In so doing they were reflecting and changing the collective morality which was the substitute in a democratic society for any other authority outside of the law.*"[38]

Whether finding its origin in religious belief, ethical system, or rational process, this "collective morality" is a legitimate source of criminal law in our society. By this means our criminal laws teach and compel the observance of standards of behavior not demonstrably related to harm to others or the survival of society but nevertheless important to our individual or collective well-being. Our laws forbidding obscenity, indecent exposure, or lewdness are of this type, protecting our traditional moral sensibilities rather than our physical welfare. Other examples could be cited.[39]

Most of our laws—particularly our criminal laws—are, in fact, an expression of what our lawmakers deem good for society. Their reasons are usually unstated or inarticulate, but that is inherent in the complexity of the task. Lawmakers who pass zoning an-

land-use laws on the basis of their perceptions of aesthetics can just as validly pass criminal laws on the basis of their judgments of morality.[40] Any democratic lawmaking proceeds from a composite of factual findings based on empirical evidence or assumptions, combined with moral values attributable to religious belief or other ethical systems. It is therefore inevitable that the law will codify and teach moral values, including moral values not shared by some portion of the society—usually a minority. I find that circumstance both understandable and desirable because it maintains an essential relationship between the moral values of citizens and the requirements and teachings of law in a democratic society.

This formulation of the relationship between moral values and the criminal law obviously contemplates that the law can change to accommodate what Chief Justice Warren called "the evolving standard of decency that marks the progress of a maturing society."[41] Thus, in constitutional interpretation our Eighth Amendment limitation on "cruel and unusual punishment" is not forever bound to a 1793 interpretation that would apparently have permitted criminals to be punished by "cropping ears and branding."[42]

But the law must not depart too far from the collective morality, either to lead or to lag, or it will lose its force as a prescriber of behavior and its persuasiveness as a teacher and setter of standards. Here is the true significance of the slogan "You can't legislate morality." The law will be ineffective if it attempts to *criminalize* conduct that is not condemned by collective morality. Thus, as Edward H. Levi notes in his lecture, "the test of the community's intolerance, indignation and disgust . . . is a continuing one which has to be met if the law is to be maintained."[43] That is the lesson of the unsuccessful attempt at prohibition of alcoholic beverages.

Similarly, I contend that the law will be discredited if it attempts to *decriminalize* conduct condemned under collective morality. A Missouri judge recently applied that principle in explaining why he supported the proposed Missouri Criminal Code in retaining criminal penalties on gambling, marijuana, prostitution, obscenity, and deviate sexual relations. For example, here is what he said about homosexuality:

Rightly or wrongly, most Missourians today regard homosexuality as immoral; if the law fails to support that notion, disrespect for law and a general loosening of the bonds of society must follow. . . .

[A] majority of the people in Missouri still regard homosexuality as disgusting, degrading, degenerate, and a threat to society. Whether this is rational or not, so long as the feeling persists the majority will insist that its condemnation be reflected in a positive manner in the criminal code even if it is unenforceable.[44]

The popularity of current efforts to restore the death penalty identifies this as another area where the lawmakers (in this case the United States Supreme Court) may have led out too far in advance of the collective morality.

Differences of opinion over the appropriate relationship between law and morality are also involved in the resolution of important legal issues other than decriminalization. For example, the principal thrust of President Edward H. Levi's lecture was to explain how the United States Supreme Court had used ideas of "community standards" or "attitudes" as a basis of constitutional decisions adjudicating obscenity cases and upsetting criminal laws on abortion and capital punishment. Siding with Justice Lewis Powell's contention that "the assessment of popular opinion is essentially a legislative, not a judicial, function,"[45] Levi criticizes the Supreme Court—properly, in my view—for judicial decisions and techniques that have impaired the process by which collective morality is created and used, thus widening the gap between the people and the law.[46] By this view, the law-and-morality issue is a key consideration in the current debate over judicial activism. But that is a matter for another time.

For present purposes, the principal implication of this description of the relationship between collective morality and law is that no one need make apology for attempting to implement commonly accepted positions on moral behavior by giving them the force of law. The majority should surely exercise restraint, and the Bill of Rights will occasionally compel restraint, but society can properly promote collective morality by legislation. The law is a schoolmaster as well as a policeman, and its curriculum includes morality.

Some Recommendations

I will conclude by applying the principles I have discussed above to an evaluation of proposals for decriminalization of three categories of criminal conduct: sexual crimes, drug offenses, and public drunk-

enness and vagrancy.

First, I believe in retaining criminal penalties on sex crimes such as adultery, fornication, prostitution, homosexuality, and other forms of deviate sexual behavior. I concede the abuses and risks of invasion of privacy that are involved in the enforcement of such crimes[47] and therefore concede the need for extraordinary supervision of the enforcement process. I am even willing to accept a strategy of extremely restrained enforcement of private, noncommercial sexual offenses. I favor retaining these criminal penalties primarily because of the standard-setting and teaching function of these laws on sexual morality and their support of society's exceptional interest in the integrity of the family. The decision on decriminalization of these crimes depends on one's attitude toward legislation in support of moral principles. The other arguments have relatively less persuasive force.

In the case of drug offenses, it will come as no surprise that I believe in retaining criminal penalties on the possession and sale of currently illegal drugs. I reach this decision despite the undoubted force of the first two arguments for decriminalization. We are undoubtedly committing significant law enforcement resources in this area—resources that could be used elsewhere. I am also persuaded that our current criminal penalties on drugs, as presently enforced, probably have the effect of increasing the overall level of crime. Yet I am unwilling to adopt the conclusion of those who urge these arguments. According to one capable scholar, "decriminalizing heroin should drastically reduce the rate of serious crime since narcotics could then be provided to addicts at very low prices and they would not need to be committing crimes in order to support their habit."[48] Proponents further claim that this would remove the profit from the drug traffic and thus weaken the powers of organized crime. Though all of us would desire that result and hope it would occur as predicted, we should also look carefully at the price we would pay for the promised result.

I urge retention of criminal penalties on drug offenses because of the measurable harm drug use inflicts on identifiable victims and on society as a whole and also because criminal penalties are necessary if the law is to perform its function of teaching against and discouraging the use of drugs. Heroin and other hard drugs stand convicted of so much human misery and such staggering social costs[49] that there can be no doubt of the propriety of extensive government efforts to discourage their use. The retention of criminal penalties is part of those efforts. What would happen if the distribution of heroin and other hard drugs were decriminalized, making drugs readily available for all who wished to indulge? Experience suggests the high risk of an epidemic increase in the level of narcotics addiction. A Swedish psychiatrist who made an extensive study of the problem of drug addiction concluded that "the one factor that correlates most highly with the epidemic spread of addiction is availability of the drug in question."[50] According to this scientist, the only persons who advocate heroin maintenance are those "who don't know anything about addiction. . . ."[51]

Evidence on the effects of marijuana is far less compelling than that on heroin, at least partly because the history of experience is shorter. Yet there is accumulating evidence of disabling physical and mental deterioration from use of this drug.[52] I find it significant that the proponents of decriminalization of marijuana have chosen to associate their case with the record on alcohol. Thus, a Stanford law professor recently made this argument:

When one adds together the physical, psychological, and social dangers of the drug . . . it is impossible for any reasonable person to conclude that marijuana is more dangerous than alcohol. . . . A very powerful argument can be made for licensing the sale of marijuana as we do the sale of alcohol.[53]

This is the same kind of reasoning employed by a personal finance company whose Chicago billboards used to invite people to come in and borrow enough money to get completely out of debt. Both arguments ignore the added costs of the remedy they advocate.

A former cabinet-level official in the Department of Health, Education, and Welfare has labeled alcoholism the most serious public health problem in the country. There are 9 million alcoholics or serious problem drinkers in the United States. Their life expectancies are shortened ten to fifteen years. Each year more than 85,000 people die of alcohol-related problems. The excessive use of alcohol has been linked to at least half of our 56,000 annual motor vehicle fatalities. The annual economic loss from alcohol-related problems, including medical costs, welfare services, and lost productivity, has been estimated at from $10 to $15 billion annually.[54]

These costs support the logic of imposing criminal

penalties on the sale of alcohol. That proposal is persuasive but impractical. Our experience with prohibition shows the futility of using the criminal law against alcohol. The middle-class citizens who defied prohibition demonstrated that this law had exceeded and could not alter our collective morality.

The supposed widespread use of marijuana has been cited as a reason for decriminalizing this drug as well. But so far the collective morality seems to stand against marijuana. The National Commission on Marihuana and Drug Abuse found that 64 percent of the adult public agreed that "using marihuana is morally offensive," compared with only 40 percent for alcohol. It is also significant that 71 percent of the adults and 80 percent of the youth had never used marijuana;[55] the figures on the proportion of the population using alcohol are much higher.[56]

Logic would dictate similar treatment of alcohol and marijuana, either to criminalize both or to decriminalize both. But, as Justice Holmes observed, the life of the law has not been logic but experience, and in this case the teachings of experience oppose the criminalization of alcohol, and the dictates of collective morality oppose the decriminalization of marijuana. In that circumstance we should stay with the status quo.

There are other reasons for not decriminalizing drugs. If we increased the availability of drugs, we would be supporting addicts in their efforts to encourage others to join them in their addiction. Decriminalization of the drug traffic would only remove the drug problem from the public view. As with alcoholism, the problem would continue and grow. We would have to learn how to live with the abuse of drugs in the same calloused fashion that we have been taught to live with the staggering expense and shocking social cost of alcoholism.

Despite my opposition to decriminalization of drug offenses, I am persuaded that current criminal penalties for possession of marijuana, and even our penalties for the sale or distribution of small quantities of this drug, are too severe. For example, in New York a person who provides an adult with one marijuana cigarette can be imprisoned for up to twenty-five years; if the cigarette goes to a minor, the offense carries the same penalty as first-degree manslaughter and first-degree rape.[57] Experience teaches that, when the severity of penalties outruns our public appraisal of the seriousness of the offense, juries will refuse to convict, prosecutors will refuse to charge, and police and witnesses will neglect to enforce. I see that happening with the administration of the criminal laws against marijuana.[58] I believe we would lose little in the law's teaching effort against marijuana and perhaps gain considerable effectiveness in enforcement if we substantially reduced the severest penalties on possession and distribution of small quantities, at the same time continuing existing penalties and vigorous enforcement efforts on the sale or possession of wholesale quantities.

Although opposing decriminalization of sex and drug offenses, I favor decriminalization of the laws against public drunkenness, vagrancy, and similar crimes. I am brought to this conclusion for two reasons. First, the standard-setting function of law has little or no force in respect to public drunkenness and vagrancy. The criminal penalty has already shown itself ineffective against alcohol, and it will be even less effective against the skid-row derelict who is arrested for public drunkenness or vagrancy than it was against the middle-class citizen during prohibition. Second, the enforcement of criminal laws on drunkenness and vagrancy requires significant law enforcement, judicial, and penal resources that could be more usefully employed in the enforcement of crimes in which society has a greater interest. Thus, studies show that drunkenness and vagrancy offenses account for about two million arrests annually, about 40 percent of the total arrests for all crimes in this country.[59] Most of these arrests involve skid-row men who are arrested, jailed, convicted, released, and rearrested in a meaningless revolving door that accomplishes nothing except to impose a burden on police, courts, and jails and inflict a temporary inconvenience or convenience (bed and board and a brief period of forced sobriety) on the arrested person. The criminal process does have the effect of "cleaning the streets" of derelicts. This is a legitimate social interest, but one that ought to be pursued by some civil remedy that is subject neither to the abuses involved in the vague criminal statutes that seek to punish drunks and vagabonds nor to the expenses entailed in arrest, booking, jail, and court appearance to achieve the simple expedient of transporting a person out of a situation where he is a threat to himself or others.

Conclusion

The current movement for decriminalization involves vital matters of social policy and requires our most careful attention. We should examine the

proposals crime by crime since the principal arguments apply to some crimes but not to others. The popular label of the "victimless crime" is misleading, if not meaningless; so is the popular slogan "You can't legislate morality." Preservation of the public health, safety, *and morals* is a traditional concern of legislation. This does not justify laws in furtherance of the special morality of a particular group, but it does justify legislation in support of standards of right and wrong of sufficient general acceptance that they can qualify as "collective morality." In the exercise of its important but underestimated standard-setting function, the law should teach observance of that collective morality, thus preserving the essential relationship between the moral values of citizens and the requirements and teachings of law in a democratic society.

Notes

1. E.g., Morris & Hawkins, *The Honest Politicians' Guide to Crime Control* (1970); Schur, *Crimes Without Victims* (1965); Olivieri & Finkelstein, 18 *N.Y.L. Forum* 77 (1972); Boruchowitz, "Victimless Crimes: A Proposal to Free the Courts," *Judicature* 69 (Aug./Sept. 1973).

2. I am indebted to Edward L. Kimball, professor of law, and Darwin L. Thomas, associate professor of CDFR and sociology and director of the Family Research Center, for valuable suggestions and to Mark Zobrist for research assistance. Eric Andersen, Scott Jenkins, Bryce McEuen, and Nicholai Sorensen provided research assistance for an earlier draft.

3. Morris & Hawkins, note 1 *supra* at 5.

4. *Id.* at 6.

5. Wachtler, "The High Cost of Victimless Crimes," 28 *Record of the Ass'n of the Bar of the City of New York* 357, 360 (1973).

6. Mill, *On Liberty* 23 (7th ed. 1871).

7. Morris & Hawkins, note 1 *supra* at 2.

8. Markham, "What's All This Talk of Heroin Maintenance," *N. Y. Times Magazine* 6 (July 2, 1972).

9. *University of Utah Medical Center Report* 3 (Sept. 1973).

10. Bureau of Narcotics and Dangerous Drugs, "Fact Sheet" 13 (Washington, D.C., 1970).

11. Dept. of Health, Education & Welfare, Public Health Service, "Natality," 1 *Vital Statistics of U.S.* 1-22 (1968).

12. 59 *American Bar Ass'n Journal* 1131 (October 1973).

13. Murdock, *Social Structures* 10-11 (1949).

14. Sutherland & Cressey, *Principles of Criminology* 178 (6th ed. 1960).

15. National Advisory Commission on Criminal Justice Standards and Goals, *A National Strategy to Reduce Crime* 25, 33-34 (1973). The Commission lamented the "declines in traditional family stability" (p. 25) foretold in rising rates of illegitimate births and divorces, but, surprisingly, its recommendations for action to combat crime included no proposals for strengthening the family. It is apparently easier and more acceptable to propose structural changes in the criminal justice system.

16. Evidence is reported in Monroe, *Schools of Psychoanalytic Thought* 185-86 (1955); Walters & Stinnett, "Parent-Child Relationships: A Decade Review," *A Decade of Family Research and Action* 99, 100-101 (Broderick, ed. 1971); Reiss, "The University of the Family: A Conceptual Analysis," 27 *Journal of Marriage and the Family* 443 (1965).

17. Nimkoff, *Comparative Family Systems* 361 (1965).

18. Murdock, note 13 *supra* at 4-5.

19. Maxwell, *A Time to Choose* 14 (1972).

20. Mill, *On Liberty* 158 (7th ed. 1871).

21. *Id.* at 189.

22. *Id.*

23. *Id.* at 191.

24. *Id.* at 204.

25. *Id.* at 209-10.

26. *Id.* at 23. In light of Mill's reputation as an advocate of liberty it is also ironic that he applied his principle of liberty only to members of "a civilized community" (p. 23). In his view even despotism was "a legitimate mode of government in dealing with barbarians, provided the end be their improvement," because in that instance the end justified the means (p. 24). We still have aristocrats who will cut the corners of liberty in order to improve the lot of the barbarians.

27. Packer, *The Limits of the Criminal Sanction* 266 (1968).

28. *Id.* at 267.

29. Quinney, "Who Is the Victim?" 10 *Criminology, an Interdisciplinary Journal* 314 (Nov. 1972).

30. Neuhaus, "We Can't Legislate Morality: True or False?" *The National Observer* 24 (June 16, 1973).

31. Rostow, "The Enforcement of Morals," 18 *Camb. L. J.* 174, 197 (1960).

32. Stephen, *Liberty, Equality, Fraternity* (White ed. 1967).

33. Devlin, *The Enforcement of Morals* (1959); Hart, *Law, Liberty and Morality* (1963).

34. Devlin, "The Enforcement of Morals," The Maccabaean Lecture in Jurisprudence, 14 *Proceedings of the British Academy* 129, 138-41 (1959).

35. Hart, "Social Solidarity and the Enforcement of Morality," 35 *Univ. Chi. L. Rev.* 1, 2 (1967).

36. *Id.* at 9. A recent application of the "individual harm" standard is found in the use of the Surgeon General's findings on the harmful effects of tobacco as a basis for laws restricting cigarette advertising. To return briefly to my thesis about the standard-setting function of the law, I would suggest that in the long run the immediate effect of this law in ending advertising may be less significant than its impact as an official teacher of the semimoralistic proposition that smoking is harmful and inadvisable.

37. Devlin, note 34 *supra* at 151.

38. Levi, "The Collective Morality of a Maturing Society," 30 *Wash. & Lee L. Rev.* 399, 426 (1973).

39. See Henkin, "Morals and the Constitution: The Sin of Obscenity," 63 *Col. L. Rev.* 391 (1963); Schwartz, "Morals Offenses and the Model Penal Code," 63 *Col. L. Rev.* 669 (1963).

40. This argument comes from Neuhaus, note 30 *supra*.

41. Trop v. Dulles, 356 U.S. 86, 101 (1958).
42. "Address of Governor John Hancock," in Powers, *Crime and Punishment in Early Massachusetts 1620-1692: A Documentary History* 192-93 (1966).
43. Levi, note 38 *supra* at 424.
44. Richardson, "Sexual Offenses Under the Proposed Missouri Criminal Code," 38 *Mo. L. Rev.* 371, 387-88 (1973).
45. Furman v. Georgia, 408 U.S. 238, 443 (1972), quoted in Levi, note 38 *supra* at 420.
46. Levi, note 38 *supra* at 428-30.
47. Morris & Hawkins, note 1 *supra* at 19-23.
48. Packer, "Decriminalizing Heroin," *The New Republic* 12 (June 3, 1972).
49. U.S. House Committee on Foreign Affairs, House Res. 109 (92d Congress, 1st Session, Committee Report, 1971).
50. Markham, note 8 *supra* at 30.
51. *Id.*
52. E.g., Nahas, *Marihuana—Deceptive Weed* (1973); note 9 *supra*. But compare "First Report of the National Commission on Marihuana and Drug Abuse," *Marihuana: A Signal of Misunderstanding* 83-91 (1972).
53. Kaplan, "Official Views on Marijuana," *Science* 167 (Jan. 12, 1973).
54. Sources cited in Olivieri & Finkelstein, note 1 *supra* at 93; 117 *Congressional Record* 42344-45 (92d Congress, 1st Session).
55. "The National Commission Report," note 52 *supra* at 81, 133.
56. "The National Commission Report," note 52 *supra* at 81, 137.
57. Olivieri & Finkelstein, note 1 *supra* at 101.
58. "The National Commission Report," note 52 *supra* at 109-25, contains some evidence of this.
59. Nimmer, *Two Million Unnecessary Arrests* 1, 155 (1971); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Drunkenness* 3-4 (1967). In general, see Bahr, *Skid Row* ch. 7 (1973).